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No. 76-1694

In the Supreme Court of the United States

OCTOBER TERM, 1976

MOBIL OIL CORPORATION, *Petitioner*,

vs.

HARRY LIGHTCAP and LELA LIGHTCAP, W. I. CUTTER, FERN ELLEN MAUPIN, RICHARD M. STEWART, HAROLD PARKER AND FANNIE M. FLOWERS, *Respondents*.

REPLY BRIEF OF PETITIONER

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INDEX

Petitioner's Reply to Contentions of Respondents 1
Conclusion 10

TABLE OF CASES

Bryar v. *Campbell*, 177 U.S. 649 (1900) 7
Cromwell v. *SAC County*, 94 U.S. 351 (1877) 8
House v. *Mayo*, 324 U.S. 42, 48 (1945) 5
Lamb v. *Cramer*, 285 U.S. 217 (1932) 7
Lawler v. *National Screen Service Corporation*, 349 U.S. 322 (1955) 8
Maryland v. *Baltimore Radio Shows*, 338 U.S. 912, 917-20 (1950) 5
Mobil Oil Corporation v. *FPC*, 463 F.2d 256 (D.C. Cir. 1971), cert. den. 406 U.S. 976 (1972), reh. den. 409 U.S. 902 (1972) 4, 5, 6, 7
Mobil Oil Corporation v. *Miller*, Case No. W-3843 (D.C. Kan.) (unreported) 4, 6, 7
Panhandle Eastern Pipe Line Company v. *Public Service Commission*, 332 U.S. 507, 520 (1947) 9
Pennzoil Producing Company v. *Federal Power Commission*, 553 F.2d 485 (5th Cir. 1977), pet. for reh. pending 4
Polzin v. *National Cooperative Refinery Association*, 175 Kan. 531, 266 P.2d 293 (1954) 7
United States v. *Carver*, 260 U.S. 482, 490 (1923) 5
United States ex rel. Almeida v. *Baldie*, (CA 3 Pa.) 195 F.2d 815, cert. den. 345 U.S. 904, reh. den. 345 U.S. 946 (1953) 7

STATUTE

K.S.A. 60-208 7

No. 76-1694

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MOBIL OIL CORPORATION, *Petitioner*,

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HARRY LIGHTCAP and LELA LIGHTCAP, W. I CUTTER, FERN ELLEN MAUPIN, RICHARD M. STEWART, HAROLD PARKER AND FANNIE M. FLOWERS, *Respondents*.

REPLY BRIEF OF PETITIONER

Three contentions by Respondents require brief reply.

I.

Respondents attempt to minimize the importance of the issues presented by suggesting that the sums involved are not significant. (Res. Br. pp. 5, 6) But the facts refute the suggestion. For example:

1. Respondents ignore numerous similar suits now pending in state and federal courts and the substantial sums involved in those cases.[1] The 1976 volumes involved

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1. At footnote 2 of its petition, petitioner noted a number of cases pending in state and federal courts where lessors seek royalties on interstate natural gas computed on bases above FPC ceilings. Further investigation has disclosed the following additional cases in which similar claims are being asserted: *Gearold L. Gray* v. *Amoco Production Co.*, Case No. 3125, District Court of Grant County, Kansas; *Triphene Middleton, et al.* v. *Amoco Production Co., et al.*, Case No. 6987, 75th Judicial District Court

(Continued on following page)

in 27 of these previously noted cases exceed 207 billion cubic feet and the additional royalties to which defendant producers are exposed exceed $148,000,000.00 in only 38 of these cases. The minimum information available demonstrates the enormous future burdens which these and similar cases may impose upon consumers.

2. As to the Kansas cases alone, while Respondents refer to the potential impact of 90 similar cases which will be resolved by the ultimate decision in the cases at bar, they conveniently avoid mention of two pending class actions covering the period July 1, 1963, to December 31, 1966, or of the numerous claims which may be expected to be asserted for periods subsequent to December 31, 1966. The misleading dollar figures used by Respondents represent only the tip of the iceberg.

Footnote continued—

for Chambers County, Texas; *T. A. Dudley, et al.* v. *Amoco Production Co.*, Case No. 5188, District Court of Stevens County, Kansas; *Amoco Production Co.* v. *Northwest Pipeline Corp.*, Case No. C-58005, District Court for City and County of Denver, Colorado; *D. B. Kuhn, et al.* v. *William M. Barret, et al.*, Case No. E-77-2, Chancery Court of Miller County, Arkansas; *State of Alaska* v. *Amoco Production Co., et al.*, Case No. 71-569, 3rd Judicial District, Superior Court of Alaska; *Francia Goodwin Coe Kingery* v. *Continental Oil Co.*, Case No. EP-76-CA-60, U. S. District Court for the Western District of Texas; *Jicarilla Apache Tribe* v. *Continental Oil Co.*, Case No. 76-430P, U. S. District Court for the District of New Mexico; *Jicarilla Apache Tribe* v. *Southern Union Gas Co., et al.*, Civil Action No. 75-247, U. S. District Court for the District of New Mexico; *G. and Virginia Stratton* v. *Exxon Corp., et al.*, Case No. 1,079,838 129th District Court of Harris County, Texas; *O. P. Hillard, et al.* v. *Arkansas Louisiana Gas Co., et al.*, Case No. 77-2008, U. S. District Court for the Western District of Arkansas; *Katy Royalty Owners Ass'n, Inc.* v. *Exxon Corp., et al.*, No. 983,765, 80th Judicial District Court, Harris County, Texas; *W. J. Light, et al.* v. *Mobil Oil Corp.*, Case No. 5156, District Court of Stevens County, Kansas; *Clarence P. Roeher, et al.* v. *Mobil Oil Corp.*, Case No. 5157, District Court of Stevens County, Kansas; *LaGloria Royalty Owners Ass'n* v. *Mobil Oil Corp.*, Case No. 988,364, 19th Judicial District Court for Harris County, Texas; *Thomas Henry Jordan, Adm'r* v. *Marathon Oil Co., et al.*, Case No. 2391, 79th Judicial

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3. Respondents decline to recognize the potential and continuing litigation which would be involved and the enormous sums which would be at issue were the insular views of the majority of the Kansas Supreme Court recognized as the law of the land.

The gravity of the issues sought to be presented to this Court by the pending petition for writ of certiorari cannot be underestimated. The figures set forth above and in the Petition demonstrate the adverse impact of the judgment below upon regulated natural gas producers. The Petition and the Brief of the Northern Distributor Group as *Amici Curiae* also demonstrate the potential adverse impact of the holding below upon all other companies in the chain of transportation and resale of natural gas and upon ultimate consumers. The importance of this case to all those interests and to the administration of

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Footnote continued—

District Court for Brooks and Jim Wells Counties, Texas; *William F. Minchen, et al.* v. *Amoco Production Co., et al.*, Case No. 112,203, 212th Judicial District Court for Galveston County, Texas; *William S. Arendale, Trustee, et al.* v. *Amoco Production Co., et al.*, Case No. 62,740-A, 149th Judicial District Court for Brazoria County, Texas; *George L. Harrison and Wife* v. *Mobil Oil Corp.*, Case No. 22,185, 23rd Judicial District Court for Matagorda County, Texas; *Mary Gladys Bowers, et al.* v. *Phillips Petroleum Co.*, No. CA2-77-26, U. S. District Court for the Northern District of Texas (on transfer from state court); *H. C. Hitch, Jr., et al.* v. *Phillips Petroleum Co.*, No. 2,322, 84th Judicial District Court, Hansford County, Texas; *Thelma Puckett, et al.* v. *Phillips Petroleum Co.*, Civil Action No. P-75-CA-36, U. S. District Court for the Western District of Texas; *Sealy & Smith Foundation, etc.* v. *Shell Oil Co.*, Case No. 116,056, 10th Judicial District Court for Galveston County, Texas; *Claude C. Fonse* v. *Shell Oil Co.*, Case No. 13,495, 25th Judicial District Court for Lavaca County, Texas; *Lee Roy Valliant, et al.* v. *Union Oil Co. of California*, Case No. .....,, U. S. District Court for Northern District of Texas (on transfer from state court); *Cleon Cope* v. *Marathon Oil Co., et al.*, No. C-77-0388-T, District Court for the Western District of Oklahoma. Petitioner believes there are other pending cases but to date has been unable to survey all courts and potential defendants.

the Natural Gas Act cannot be brushed aside. Respondents' effort to do so is both erroneous and unrealistic.[2]

II.

Respondents erroneously suggest that the issues here presented were decided in *Mobil Oil Corporation* v. *FPC*, 463 F.2d 256 (D.C. Cir. 1971), cert. den. 406 U.S. 976 (1972), reh. den. 409 U.S. 902 (1972), and that in any event petitioner is, for some reason, precluded from presenting the issues in this proceeding by reason of dismissal of *Mobil Oil Corporation* v. *Miller*, Case No. W-3843 (D.C. Kan.), by unreported order filed December 4, 1972. The record does not support these claims.

A. With respect to *Mobil Oil Corporation* v. *FPC*, supra, petitioner has already pointed out in its petition for writ of certiorari (pp. 19-21) the limited scope of the District of Columbia Circuit Court's decision and the issues which that Court declined to consider and decide. The Court of Appeals expressly listed the issues which it did not decide and considered left open.

> "Without purporting to rule on the matter in any way, we can certainly visualize the possibility that a court confronted with a contention of entitlement to a market price basis higher than the producer's ceiling would consider it to run counter to the intention of the parties, unless there is something to rebut the fair presumption that they contemplated interstate movement and market prices compatible therewith. The court might also consider that the result would be in furtherance of the general principle against application of contracts so as to contravene public policy, whether or not the result would be in violation of supremacy clause doctrine prohibiting state rules or decisions that require a regulated company to take action inconsistent with Federal regulation, see Northern Natural Gas Co. v. State Corp. Comm. of Kansas, 372 U.S. 84 (1963)." (463 F.2d at 265)

2. The dilemma now confronting the Federal Power Commission is (1) to permit "flow-through" of royalty owners' recoveries by allowing increases in the rates charged by producers, or (2) to permit early, premature "abandonment" of interstate sales of royalty volumes. See *Pennzoil Producing Company* v. *Federal Power Commission*, 553 F.2d 485 (5th Cir. 1977), pet. for reh. pending. Obviously, if Mobil and the minority of the Kansas Supreme Court are correct that FPC-prescribed rates limit royalty payments by reason of federal preemption, the Federal Power Commission's dilemma and undesirable "choices" will be removed.

It is these questions, posed but not answered in the opinion of the District of Columbia Circuit Court, which have been preserved by Mobil throughout the litigation in the Kansas courts, which have been decided for the first time by an appellate court by the opinion in this case, and which are now ripe for consideration and resolution by this Court.

B. Respondents insinuate that the issues now presented were somehow passed upon by this Court in connection with its denial of certiorari in *Mobil Oil Corporation* v. *FPC*, supra. (Respondents' Brief, pp. 7, 11, 12) This Court has repeatedly said that "The denial of a writ of certiorari imparts no expression of opinion upon the merits of the case, as the bar has been told many times." *United States* v. *Carver*, 260 U.S. 482, 490 (1923); *House* v. *Mayo*, 324 U.S. 42, 48 (1945); and *Maryland* v. *Baltimore Radio Shows*, 338 U.S. 912, 917-20 (1950).

Respondents' reliance upon the denial of certiorari in *Mobil Oil Corporation* v. *FPC*, supra, is misplaced.

C. Respondents' claim that the issues now presented were litigated and decided in the United States District

Court for the District of Kansas in *Mobil Oil Corporation* v. *Miller*, No. W-3843, dismissed by unreported order filed December 4, 1972, is not supported by the record. Issues now presented were neither raised nor decided in that case.

The cases at bar were commenced in the state courts of Kansas in late 1963 and the issues, including those which we now seek to present to this Court, were joined in state courts. In late 1966, Petitioner and others filed complaints with the FPC, seeking the Commission's initial decision with respect to its jurisdiction over royalty owners as "natural-gas companies" under the definitions in Section 2 of the Natural Gas Act. Meanwhile, the cases at bar were going forward in state courts. Accordingly, in May, 1967, Petitioner filed suit in the United States District Court for the District of Kansas, asserting violations of the Natural Gas Act in the pursuit by royalty owners of payment of royalty based on prices exceeding FPC ceilings and requesting a permanent injunction against the prosecution of the state court actions. On the basis of the verified complaint, a preliminary injunction was granted, pending ruling of the FPC with respect to its jurisdiction. (R. 90) The injunction was never made permanent, but continued in force while the District Court considered a motion for rehearing. While the question of entry of a permanent injunction was still pending and unresolved, the District of Columbia Circuit Court handed down its decision in *Mobil Oil Corporation* v. *FPC*, 463 F.2d 256, reversing the FPC's assumption of jurisdiction over the royalty owners and their royalty payments.

Certiorari was denied by this Court and thereafter, on the strength of the decision in *Mobil Oil Corporation* v. *FPC*, supra, the Kansas District Court set aside the

temporary injunction and dismissed the case.[3] Thereafter, the cases at bar proceeded to trial, judgment and appeal. At no point during these proceedings did Respondents assert either in their pleadings, in the pre-trial order or in their appellate Brief, that the *Miller* case was a bar to litigation of the issues which Petitioner now presents for review by this Court,[4] notwithstanding the fact that such issues have been consistently urged by Petitioner throughout these proceedings. Under these circumstances, the issues which Petitioner seeks to have reviewed by this Court remain viable and unresolved.

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3. The temporary injunction in the case of *Mobil Oil Corporation* v. *Miller* was dissolved solely on the basis of the jurisdictional decision of the District of Columbia Circuit in *Mobil Oil Corporation* v. *FPC*, supra, and without trial on the merits of any other issues. The dismissal was not entered "with prejudice." Dismissal under these circumstances ordinarily indicates, as we believe it did in this case, the absence of a decision on the merits and leaves the parties free to litigate the matter in a subsequent action, without regard to the dismissed action. *United States, ex rel. Almeida* v. *Baldie*, (CA 3 Pa.) 195 F.2d 815, cert. den. 345 U.S. 904, reh. den. 345 U.S. 946 (1953); *Lamb* v. *Cramer*, 285 U.S. 217 (1932). Apparently, Respondents agree with this procedural principle, for they did proceed to litigate the issues without protest through the trial court and on appeal to the Kansas Supreme Court.

4. Ordinarily, the bar of a prior adjudication (res judicata or its companion, estoppel by judgment) must be especially pleaded if a party seeks to rely thereon. If the estoppel is not pleaded, the court is neither bound nor permitted to take notice of it. Certainly, that is true in Kansas. K.S.A. 60-208 provides in pertinent part:

> "General rules of pleadings. . . .
>
> "(c) Affirmative defenses. In pleading to a preceding pleading a party shall set forth affirmatively . . . res judicata, . . . any other matter constituting an avoidance or affirmative defense. . . ."

See, also, *Polzin* v. *National Cooperative Refinery Association*, 175 Kan. 531, 266 P.2d 293 (1954). This Court has enforced this procedural rule on numerous occasions. *Bryar* v. *Campbell*, 177 U.S. 649 (1900).

Res Judicata operates only to bar relitigation by the same parties of issues *actually* presented, decided and resolved in a prior proceeding. *Cromwell* v. *SAC County*, 94 U.S. 351 (1877); *Lawler* v. *National Screen Service Corporation*, 349 U.S. 322 (1955). Nothing in the history of litigation between Petitioner and Respondents even purports to contain facts, rulings or decision giving rise to applicability of the doctrine to this case.

III.

Respondents suggest that all of the members of the Kansas Supreme Court agreed "that the fact petitioner is regulated by the Federal Power Commission does not preclude enforcement of Respondents' contractual common law recovery under any of the leases". (Respondents' Brief, p. 6) This is misleading. Respondents imply that the lower court was unanimous in its holding that:

> "The existence of federal regulation fixing the maximum rate a gas producer may receive from its purchaser is no obstacle to the fixing of a higher rate as the 'market value' of the gas it sells for the purpose of computing royalties." (Ap. A1)

In fact, a three-judge minority of the lower court disagreed completely with the majority of four. Contrary to the view of the majority, the minority was of the view that:

> ". . . We agree that the royalty obligation under a gas lease is a question of state law, to be determined from the terms of the lease. However, the dollar amount of royalty due under a lease for gas produced and obligated for interstate sale can be indirectly affected by federal price regulation." (Ap. A62)

and that

> "The existence of regulation is a limiting factor on the royalty bases under a 'market price' lease just as surely as it is under a 'proceeds' lease. . . ." (Ap. A69)

To adopt the view of the majority is in effect to agree that in enacting the Natural Gas Act the Congress, contrary to its intent, left a regulatory gap, notwithstanding the frequently expressed view of this Court that "Congress meant to create a comprehensive and effective regulatory scheme, . . ." *Panhandle Eastern Pipe Line Company* v. *Public Service Commission*, 332 U.S. 507, 520 (1947). A minority of the Kansas Supreme Court obviously recognized the paramount effect of the federal regulation. A denial to the Commission of direct jurisdiction over the royalty owner and his royalty payments does not, as Respondents contend, insulate the lessor's royalty from the limiting effects of FPC ceiling price determinations. Otherwise, the comprehensive scheme of regulation which Congress envisioned is frustrated.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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